

4. CULTURAL RESOURCES

4.1 Introduction

Cultural resources encompass the following four broad categories:

- Archeological materials (artifacts) and sites dating to the Prehistoric, Historic, and Ethnographic Periods that are found on the ground surface or are buried.
- Standing structures that are over 50 years of age or are important because they represent a major historic theme or era (e.g., Cold War technology).
- Cultural and natural places, burial grounds, select natural resources, and sacred sites (rock formations, petroglyphs, pictographs, etc. that are fixed to the land) that have importance for American Indians, Native Alaskans, and Native Hawaiians.
- American folklife traditions and arts (e.g., Native American basketry and ceramics).

Of the above four categories, only two have relevance for real property transfers -- historic properties and sacred sites. Artifacts, sacred objects (such as masks, votive offerings, utensils, clothing, or materials used in a religious rite or ceremony), funerary objects, human remains, and other items that have been exhumed, unburied, or otherwise removed or freed from the ground are not considered part of real property and must be treated as personal property. Recordings of oral histories, folklore, and music must also be treated as personal property. The requirements in this guidance document pertain only to real property (see § 1.2.1). Artifacts that are still buried in the ground and collectively known as archeological sites are treated together with historic structures under the heading of historic properties. Fossils (i.e., paleontological artifacts) and fossiliferous sites are discussed later in § 4.10.

Cultural resources are considered environmentally sensitive resources along with floodplains/wetlands and natural resource habitats/ecosystems. The only difference between cultural resources and these

other environmentally sensitive resources is that cultural resources pertain to the human environment instead of the natural environment. Cultural resources are important because of the profound need to protect and preserve, as part of community life, the resources that remind us of our origins, give us a sense of direction, and serve as sources of inspiration. For further information and guidance, see the EH-412 Information Brief (DOE, 1993), *Management of Cultural Resources at Department of Energy Facilities* and the EH-412 memorandum (DOE, 1990) with the same title.

Of special significance is protection of cultural resources of Native Americans (American Indians, Native Alaskans, and Native Hawaiians). The Federal government is committed to a "Government-to-Government Relation" with Indian tribes, Native Alaskan villages, and Native Hawaiian organizations (see Executive Memorandum for Heads of Executive Departments and Agencies in 59 FR 22951 of May 4, 1994). Of particular importance are cultural resources that still serve a vital, day-to-day function in the traditional religious rites and ceremonies practiced by Native Americans. The term sacred site is used to refer to (1) habitats of sacred plants and animals and (2) places of Native American rites, ceremonies, and religious practices. Secular plant and animal resources that are vital to the subsistence of or used as medicine by Native Americans are generally regarded as socioeconomic resources and are addressed in Chapter 4. Regardless of whether they are Native traditional subsistence use areas, areas that are protected by treaty are not covered in this guidance document because the treaties are considered legally binding encumbrances (see glossary).

4.2 Drivers for the Requirements

A combination of two statutes and one Presidential Executive Order (E.O.) protects cultural resources with respect to transfers of Federal property. The National Historic Preservation Act (NHPA) is the most powerful of all of these (see EH-412 information brief, *National Historic Preservation Act*). The American Indian Religious Freedom Act protects sacred objects, sacred sites, and religious

4. Cultural Resources

ceremonies. Sacred sites are further protected by E.O. 13007, "Indian Sacred Sites" issued May 24, 1996.

GSA regulations at 41 CFR 47.202-2(b)(8) reiterate the requirements of NHPA and mandate the reporting of impacts of real property transfer on historic properties. DOE Order 1230.2, "American Indian Tribal Government Policy," prescribes DOE procedures to implement the American Indian Religious Freedom Act as well as Federal policies, laws, treaty obligations, and DOE's responsibilities as a Federal agency to ensure that tribal rights and interests are identified and considered in pertinent decisionmaking. In addition, information on historic properties and sacred sites should be reported in the Notice of Intention to Relinquish for submission to BLM pursuant to 43 CFR 2372.1.

GSA regulations at 41 CFR 47.202-2(b)(5) require that the status of civil and criminal jurisdiction over the land be reported in Standard Form 118. Because the Archeological Resources Protection Act gives DOE civil and criminal jurisdiction with respect to archeological resources on its lands, the status of DOE as a Federal land manager and the consequences of loss of Federal ownership in real property transfers must be reported in Standard Form 118 (also see § 4.9 and § 4.10).

4.3 Requirements in Real Property Transfers

Section 106 of NHPA requires Federal agencies to determine the impact of any undertaking (including real property transfers) on historic properties. Historic properties are buildings, structures, sites, or archeological resources already on or eligible for inclusion on the National Register of Historic Places (NRHP). The Section 106 process is implemented by the Advisory Council on Historic Preservation regulations at 36 CFR Part 800. An EH-412 memorandum (DOE, 1994), "Cultural Resources and Future Land Use Options," calls attention to Section 110 of NHPA. Section 110(a)(2) of NHPA requires Federal agencies to "exercise caution to assure that any such property that might qualify for inclusion is not inadvertently **transferred, sold** [emphases added], demolished, substantially altered, or allowed to deteriorate significantly."

Attachment 1 of DOE Order 1230.2, "DOE American Indian Policy," requires DOE field elements to consult with potentially affected Tribes concerning impacts of proposed DOE actions (including real property transfers), and to avoid unnecessary interference with traditional religious practices. E.O. 13007 dictates that all Federal agencies (1) accommodate access to and ceremonial use of sacred sites by Native American religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites.

4.4 Implementation of the Requirements

The first step in implementing the requirements is to identify all possible historic properties and sacred sites on the land. This step may have already been accomplished in a cultural resource management plan, a site-wide environmental impact statement, a *Technical Site Information* document, or through a combination of surveys and studies. Data gathering is discussed in § 4.4.1. The second step is to assess the impact of a transfer of property on each of the two types of cultural resources. Assessment of impacts is discussed in § 4.4.2. Implementation of the Section 106 process of NHPA is depicted in Exhibit 4-1.

4.4.1 Sources of Records on Cultural Resources

A complex-wide memorandum, "Management of Cultural Resources at Department of Energy Facilities," was issued February 23, 1990. Your DOE site should have prepared, at that time, a cultural resource management plan that responds to statutory mandates and regulations protecting and preserving cultural resources. If your site does not fall under the jurisdiction of any cultural resource management statute, it is not required to have such a plan if an explanatory letter has been transmitted to the DOE Federal Preservation Officer (EH-412). These plans are required under Section 101(f) of the NHPA; an individual plan should be developed to supplement the master plan for each specific unit of land. These plans should be prepared in accordance with *Environmental Guidelines for Development*

Step 1: Identify/Evaluate Historic Properties
 Agency assesses information needs:
 agency/SHPO locate and evaluate National
 Register eligibility of possible historic properties*

Exhibit 4-1
Section 106 Process for Historic Properties

Enter through box labelled
 Cultural Resources in Exhibit 1-3

Disagreement
 about eligibility;
 agency seeks
 determination from
 Secretary of the Interior

No historic
 property
 found*

Historic
 property
 found

Agency
 notifies SHPO
 and interested
 parties; makes
 documentation
 public

Step 3: Consultation
 Agency/SHPO (others) consult; agency
 notifies ACHP; ACHP participation is optional

**Memorandum of
 Agreement (MOA)**
 Developed and executed

No MOA;
 Consultation
 terminated

Step 4: ACHP Comment
 With MOA: Absent MOA:

ACHP
 signs or
 accepts
 MOA

ACHP proposes
 changes
 Agency agrees

Agency
 agrees

ACHP issues
 written
 comments

Agency
 disagrees

Agency
 carries out
 MOA terms

Agency considers
 ACHP comments
 notifies ACHP
 of decision

Step 5: Proceed

*Public may request Council review of agency's findings at these points.

4. Cultural Resources

of *Cultural Resource Management Plans* issued by EH-412 in August 1995. A properly executed cultural resource management plan should include a survey for historic properties (indicating which properties are NRHP-listed or NRHP-eligible), burial grounds, sacred sites, areas protected by Indian treaties, and other cultural resources.

A second source of information about cultural resources on a site is a site-wide environmental impact statement (SWEIS) for continued operation of a facility. SWEISs are required under the National Environmental Policy Act implemented via DOE regulations at 10 CFR Part 1021. Although a SWEIS should discuss all the cultural resources that potentially could be affected by site operations, it is intended to provide neither a complete inventory nor a detailed description of all cultural resources on the property.

In the event that no inventory records are available on cultural resources at a site, you must conduct a combination of surveys and studies. Be sure that a survey is conducted to show which land parcels are disturbed and which are undisturbed. On parcels of disturbed or improved land, a further survey is needed to identify historic properties (both NRHP-listed and NRHP-eligible). On parcels with undisturbed land, a further survey is needed to identify buried archeological artifacts and Native American human remains and funerary objects. These surveys can be performed either by in-house experts or by a contractor archeologist. The archeologist should meet the Secretary of Interior's Professional Qualifications Standards (National Park Service, 1984). Have the surveys reviewed by the appropriate State Historic Preservation Officer.

As far as Native American sacred sites are concerned, retain a professional anthropologist to conduct a study. A professional anthropologist is necessary because specialized knowledge is required in ascertaining information about tribes that may have formerly occupied the land and have migrated elsewhere (see text box).

4.4.2 Assessment of Impact on Historic Properties

If you find cultural resources, then you must assess the effect of transferring the property on each cultural resource. For historic properties, the

A Professional Anthropological Survey

An example of a professional anthropological study of Native American sacred sites is found in the "American Indian Religious Freedom Act (AIRFA) Compliance at the Savannah River Site" (DOE, 1991). The study includes an inventory of plants used in religious ceremonies. Consultation was conducted with a number of Tribes no longer residing near Savannah River. For example, the Muskogee Creeks that once occupied the Savannah River Site vicinity were expelled by the Indian Removal Act of 1830 to Oklahoma. The consultation noted that although the Muskogees still continue their native religious traditions, they no longer have an interest in the Central Savannah River Valley. However, the Yuchis, also involuntarily removed to Oklahoma from the Central Savannah River Valley, indicated through consultation an interest in any DOE impacts on (1) five sacred sites or (2) Yuchi access to two sacred plants (New Jersey Tea and Button Snakeroot).

Advisory Council on Historic Preservation (ACHP) requires you to apply "criteria of effect" to determine whether there will be an effect [36 CFR 800.9(a)], and if so, then you must apply "criteria of adverse effect" to determine whether the effect is harmful [36 CFR 800.9(b)]. The effect must be assessed concluding in "no effect," "no adverse effect," or "adverse effect." As a rule of thumb, if the care or treatment of a historic property does not change in the transfer of the property (regardless of whether there is a change in ownership or use), there is essentially no effect on the historic property. The State Historic Preservation Officer (SHPO) [see the EH-412 information brief, *State Historic Preservation Officers*] must review an assessment of "no effect" and "no adverse effect." The ACHP reviews any assessments involving either a "no adverse effect" or a dispute between the SHPO and DOE. If there is an adverse effect, you must consult with the SHPO, who may or may not require a memorandum of agreement between DOE and the SHPO concerning mitigation of the adverse effect. You must notify the ACHP, which may sign or accept the memorandum of agreement. If there is no memorandum of agreement, the ACHP may issue written comments. The Section 106 process is usually integrated with the NEPA process where appropriate (see Section 4.6). At this time, ACHP

is revising the rules for protecting historic properties.

4.4.3 Assessment of Impact on Sacred Sites

The American Religious Freedom Act, Archaeological Resources Protection Act, Native American Graves Protection and Repatriation Act, and NHPA require DOE to consult with the potentially affected American Indian tribes, Native Alaskan villages, or Native Hawaiian organizations regarding the effect of the real property transfer on traditional religious rites and ceremonies. You should follow the protocol for consultation that should be established in a site-specific DOE-American Indian Tribal Government Policy Implementation Plan for your site, required under DOE Order 1230.2, § 7, ¶ f(2). In the event there is no such Plan for your site, follow the protocol for consultation in DOE Order 1230.2, § 7, ¶ f(5) & (6). In the consultation, you should present the results of any study identifying sacred sites and inquire if there are any other burial grounds, sacred sites, or ceremonies that should be protected. The Act requires that you use the consultation information to determine the appropriate measures to protect and preserve Native American religious rights and practices.

While the American Indian Religious Freedom Act does not require explicitly that DOE conform to the wishes of any American Indian tribe, Native Alaskan village, or Native Hawaiian organization, E.O. 13007 does impose certain obligations on DOE regarding sacred sites. These obligations are as follows:

- Accommodate, to the extent practicable and as allowed by law, access to and ceremonial use of Indian sacred sites by religious practitioners.
- Avoid affecting the physical integrity of such sacred sites.
- Maintain the confidentiality of such sacred sites.

In respect for Native Americans, the confidentiality of identity and locations of sacred sites, names of traditional native religious leaders, and practices associated with religious rites and ceremonies

should also be maintained. The same procedure for confidentiality given in the Archaeological Resources Protection Act § 9 should be followed. Implementation of the requirements for protecting and preserving sacred sites is summarized in Exhibit 4-2.

4.5 Relationship to Environmental Baseline Survey

Information gathered about cultural resources should also appear in an environmental baseline survey (see Chapter 12). Be aware that the ASTM E-1528-93 Standard, "Standard Practice for Environmental Site Assessments: Transaction Screen Process" and ASTM E-1527-94 Standard, "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process," treat cultural resources as "non-scope" considerations. Cultural resources are non-scope considerations because the focus of the ASTM Standards is on commercial real estate. NHPA and E.O. 13007 apply only to Federal actions and agencies, respectively, and do not apply to private parties.

4.6 Relationship to NEPA Documents

ACHP regulations at 36 CFR 800.14 encourage Federal agencies to coordinate the Section 106 process with environmental review processes, such as those established by NEPA. Similarly, the CEQ regulations implementing NEPA require that NEPA documents be prepared concurrently and integrated with other environmental reviews to the fullest extent possible (40 CFR 1502.25). You should prepare the (1) identification of historic properties and sacred sites and (2) assessment of impacts on historic properties and sacred sites and include both (1) and (2) in an environmental assessment or environmental impact statement (see Chapter 13). The discussion should be commensurate with the significance of the impacts.

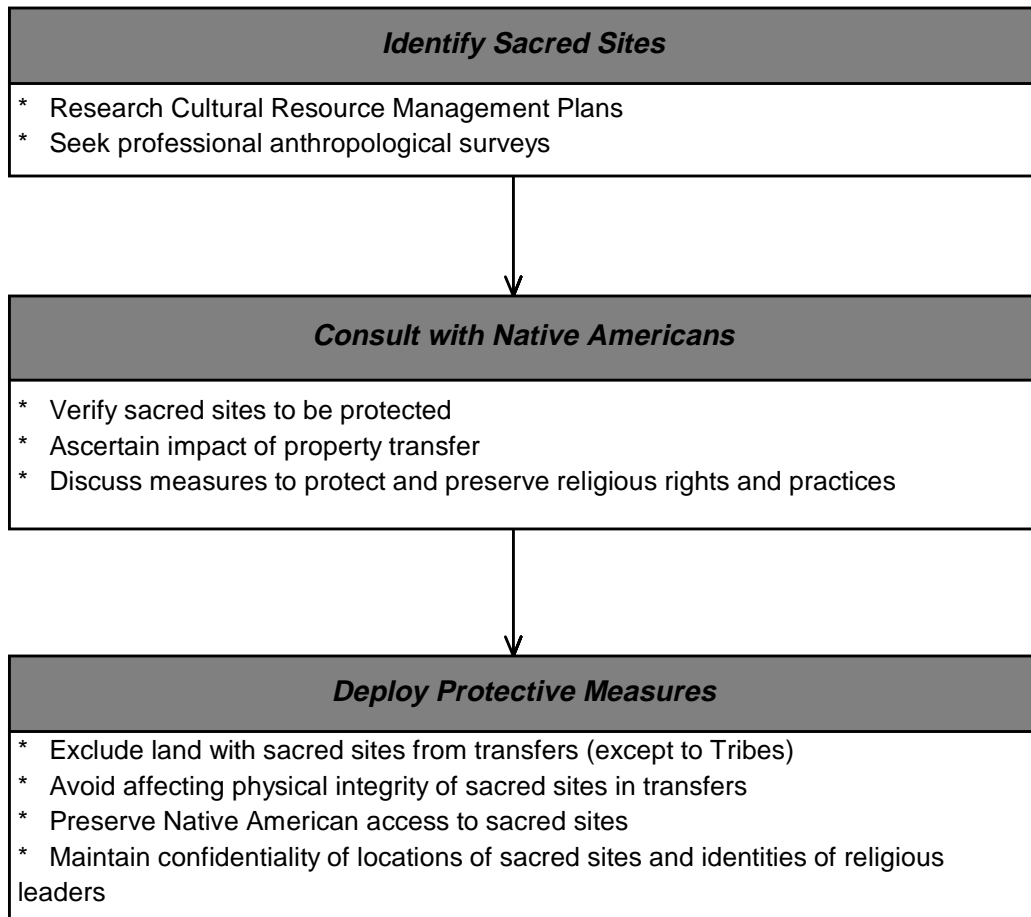
4.7 Leases and Other Outgrants

4.7.1 Leases of Historic Buildings

While most environmental requirements restrict the use of environmentally sensitive resources, § 110 of the NHPA is unusual in encouraging the use of

Exhibit 4-2

Implementation of Requirements for Sacred Sites



historic buildings, to the maximum extent feasible. Section 111(a) of NHPA authorizes DOE to lease or exchange historic buildings, after consultation with the ACHP. Thus, lease of space in DOE historic buildings is fettered only by the need to ensure that the (1) use by the lessee does not cause deterioration and (2) treatment of the buildings is consistent with the *Secretary's Standards and Guidelines for Historic Preservation Projects*. The National Park Service published *Section 110 Guidelines: Annotated Guidelines for Federal Agency Responsibilities under Section 110 of the National Historic Preservation Act*, covering leases of historic buildings at 53 FR 4727 on February 17, 1988.

DOE may retain the proceeds from the lease of a DOE-owned historic building for defraying the costs of administering, maintaining, reporting, and preserving the building. However, DOE must deposit surplus leasing proceeds with the U.S. Treasury.

A proposed rulemaking by ACHP may affect leases, sales, and other transfers of property.

4.7.2 Outgrants Involving Other Cultural Resources

You should exclude any archeological sites, burial grounds, sacred sites, and access routes to sacred sites from an outgrant (easement, lease, license, or permit) of real property. If there is a compelling reason to include any of the aforementioned parcels of land in an outgrant, you should explicitly impose in the conveyance specific restrictions on land use, disturbances, and improvements so as to protect and preserve cultural resources. In addition, cite the cultural resource management laws that protect such resources and provide for compliance by prospective lessees. For example, you might stipulate that data recovery be conducted by an archeologist before commencing an excavation to fulfill a memorandum of agreement with a SHPO. In all outgrants of undisturbed land which might be excavated, it is highly recommended that you append to the conveyance a mandatory plan for addressing inadvertent discoveries of Native American human remains and funerary objects consistent with the Native American Graves Protection and Repatriation Act.

4.8 Notice of Intention to Relinquish

If the subject real property is withdrawn land being declared excess, include the following information regarding historic properties and sacred sites in the Notice of Intention to Relinquish (see § 1.6.2) to be submitted to the Bureau of Land Management:

- Inventory and description of NRHP-listed and NRHP-eligible properties, burial grounds, sacred sites, and access routes to sacred sites.
- Changes or disturbances to any NRHP-listed and NRHP-eligible properties, burial grounds, sacred sites, and access routes to sacred sites.
- Terms and conditions necessary to be incorporated in any further disposition of the land to protect NRHP-listed and NRHP-eligible properties, burial grounds, sacred sites, and access routes to sacred sites. (Also, provide the names of the American Indian Tribes, Native Alaskan villages, or Native Hawaiian organizations who should be consulted regarding sacred sites.)

4.9 GSA-Specific Requirement

In the transfer of the real property being declared excess, a Standard Form 118 must be completed. As an attachment to the form, include information on historic properties identifying specifically (1) NRHP-eligible sites, (2) NRHP-listed sites, and (3) any public effort to have a property listed on the NRHP.

GSA regulations at 41 CFR 47.202-2(b)(5) require that the status of DOE civil and criminal jurisdiction over the land be reported in an attachment to Standard Form 118. If there are archeological artifacts, or Native American human remains or funerary objects buried on DOE land, the Archaeological Resources Protection Act makes DOE a Federal land manager. As a Federal land manager, DOE has civil and criminal jurisdiction over the protection of these items from looting, vandalism, or trafficking. Therefore, the status of DOE as a Federal land manager must be reported on this form. Furthermore, it is important to explain the consequence of loss of Federal ownership on this form. The major consequence of loss of

4. Cultural Resources

Federal ownership would be the loss of Federal protection of these items because the Archaeological Resources Protection Act protects such items only if they are on Federal or Indian lands.

4.10 Disposal of Property with Cultural Resources

DOE property known to contain buried archeological artifacts, Native American human remains or funerary objects, or sacred sites should not be disposed of except for transfer to (1) another Federal agency, (2) an appropriate Indian tribe, (3) a prospective owner with a compatible use, or (4) a prospective owner with a compelling need. As previously mentioned, such items and sites are protected insofar as the land remains Federally owned. An example of disposal of property to prospective owners with compatible uses would be an archeological site to a museum. It is difficult to justify real property transfers on the basis of meeting a compelling need; disposals of such properties must be decided on a case-by-case basis. Compelling needs include those for the protection of national security, life, and safety.

DOE-owned historic property may be transferred for historic monument purposes.

Disposals of historic properties are discouraged because of the loss of Federal protection. However, disposals of historic properties may be carried out provided they are subjected to the Section 106 process as described in § 4.4.2. To show that a disposal has no adverse effect, the new owner would have to be committed to (1) protecting the property from deterioration and (2) treating the buildings in accordance with the *Secretary's Standards and Guidelines for Historic Preservation Projects* (see text box).

4.11 Checklist

- ☐ Have all cultural resources, including historic properties and burial grounds, sacred sites, and access routes to sacred sites, been identified? (If there are no cultural resources involved, stop here.)
- ☐ Have the impacts of real property transfer on all identified cultural resources been

The Secretary of Interior's Involvement in Transfers of Historic Properties

The Federal Property and Administrative Services Act of 1949, as amended, allows the transfer of surplus Federal government real property for historic monument purposes. The procedures for such a transfer are specified in 41 CFR 101-47.308-3. Under these regulations, the Secretary of the Interior determines whether the proposed use of a real property is compatible with its historic character and approves the architectural and financial plans for rehabilitation, restoration, and maintenance. The Secretary will adopt and approve the transferee's plans if the plans are the subject of a memorandum of agreement executed pursuant to 36 CFR Part 800. In the absence of a memorandum of agreement, the Secretary follows the procedures established in 41 CFR 101-47.308-3.

NHPA Section 110(e) allows the transfer of historic properties for other reasons when the plans of the transferee are reviewed and approved by the Secretary of the Interior. The Secretary's reviews under Section 110(e) are conducted in conjunction with the Advisory Council's review of the proposed real property transfer under NHPA Section 106.

assessed as described in § 4.4.2 and § 4.4.3?

- ☐ If burial grounds, sacred sites, and access routes to sacred sites have been identified on the property, have the potentially affected Indian tribes, Native Alaskan villages, and Native Hawaiian organizations been consulted?
- ☐ From the consultation, have the appropriate measures necessary to protect and preserve Native American religious rights and practices, the physical integrity of sacred sites, and access to such sites been determined?
- ☐ Have considerations been made, such as:
 - (1) not transferring the real property;
 - (2) excluding from the transfer archeological sites, burial grounds, sacred sites, and access routes to sacred sites; or
 - (3) imposing restrictions so as to protect and preserve archeological sites or lands

with sacred sites, access routes to sacred sites, and the physical integrity of sacred sites?

- ☐ If the real property is being declared excess, have data on these historic properties, burial grounds, sacred sites, and access to sacred sites been included in the environmental site assessment or environmental baseline survey?
- ☐ If an environmental assessment or environmental impact statement is being prepared in association with a real property transfer, have data on these historic properties, burial grounds, sacred sites, and access to sacred sites been included?
- ☐ If historic buildings are offered for lease, license, or permit (see glossary), has there been consultation with the ACHP and have the appropriate restrictions been incorporated to protect the buildings in the conveyance?
- ☐ If the real property being declared excess is withdrawn land, have (1) data on historic properties, burial grounds, sacred sites, and access routes to sacred sites; (2) any changes or disturbances to these cultural resources; and (3) any terms and conditions deemed necessary to be incorporated in any further disposition of the land to protect these cultural resources been included in the Notice of Intention to Relinquish to be submitted to the Bureau of Land Management?
- ☐ If the real property being declared excess is acquired land or withdrawn land rejected by the Bureau of Land Management, have data on historic properties been included as an attachment to Standard Form 118?
- ☐ If the property is offered for sale, have the parcels with cultural resources been excluded from the sale? If there is compelling reason to include these resources in the sale, have sufficient restrictions been placed in the deed to protect and preserve historic properties,

burial grounds, sacred sites, and access routes to sacred sites?

- ☐ Have confidentiality provisions been attached to all data concerning burial grounds, sacred sites, and access routes to sacred sites as well as identities of Native traditional religious leaders?

4.12 References

- ASTM, 1994. "Standard Practice For Environmental Site Assessments: Phase I Environmental Site Assessment Process," American Society for Testing and Materials Standard E-1527-94, June 1994.
- ASTM, 1993. "Standard Practice for Environmental Site Assessments: Transaction Screen Process," American Society for Testing and Materials Standard E-1528-93, May 1993.
- DOE, 1995. *Environmental Guidelines for Development of Cultural Resource Management Plans*, DOE/EH-0501, U.S. Department of Energy, Office of Environmental Policy and Assistance, Air, Water, and Radiation Division, EH-412, August 1995.
- DOE, 1993. *State Historic Preservation Officers*, EH-232-0007/1193, Cultural Resources Management Information Brief, U.S. Department of Energy, Office of Environmental Guidance, Air, Water, and Radiation Division, EH-412, November 1993.
- DOE, 1993. *Management of Cultural Resources at Department of Energy Facilities*, EH-232-0005/0893, Cultural Resources Management Information Brief, U.S. Department of Energy, Office of Environmental Guidance, Air, Water, and Radiation Division, EH-412, August 1993.
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4. Cultural Resources

DOE, 1991. "American Indian Religious Freedom Act (AIRFA) Compliance at the Savannah River Site," U.S. Department of Energy, Savannah River Operations Office, Environmental Division, April 1991.

DOE, 1990. "Management of Cultural Resources at Department of Energy Facilities," EH-213 Memorandum, U.S. Department of Energy, Office of Environmental Guidance, Air, Water, and Radiation Division, EH-412, February 23, 1990.

National Park Service (NPS), 1984. *Professional Qualifications Standards*, 36 CFR Part 61, Appendix A.

National Park Service (NPS), 1983. *Secretary's Standards and Guidelines for Historic Preservation Projects*, U.S. Department of the Interior, National Park Service, Interagency Resources Division, September 29, 1983.